SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1967
No. 630

UNITED STATES OF AMERICA and STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Petitioners,

vs.

ALFRED E. COLEMAN, *et al.*,

Respondents.

PETITION BY ALFRED COLEMAN FOR REHEARING.

GEORGE W. NILSSON, ESQ.,
714 West Olympic Boulevard,
Los Angeles, Calif. 90015,
Attorney for Respondent.

W. H. WEDDELL, ESQ.,
MONTA W. SHIRLEY, ESQ.,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Alfred Coleman presents this his petition for rehearing herein for the following reasons:

(1) The decision of the court herein, dated April 22, 1968, is contrary to the provisions of the Constitution of the United States, Article I, Sec. 1; Article II, Sec. 3; Article IV, Sec. 3; Clause 2.

(2) It is contrary to the Mining Laws and other aplicable laws.

(3) It applies the "Common Varieties Law of 1955" (30 U.S.C. 611), contrary to its express provisions in several paragraphs, excluding mining claims located prior to passage of the Act. By doing so Coleman is denied due process under the Constitution and Bill of Rights.

(4) No regulation has been published by the Department of Interior concerning "marketability at a profit".

(5) It is not supported by, but is contrary to, the evidence; and

(6) There is denial of due process of law in violation of the 5th and 14th Amendments of the Bill of Rights.

I.
Introduction.

In order to understand the basis of our petition it is necessary to briefly go back to the beginning of this whole affair. Mr. Coleman testified as follows in regard to his reason for locating these mining claims (App. p. 166).

> "A. At the end of World War II, I was sent out on the street to pound the pavements, because I had a disability, and the politicians said merchant seamen were not veterans.
>
> "After being decorated five times in fighting a war, for five years, I had to make a living. So I had to do something that would create an estate, and it couldn't be created out of ordinary wages. It had to be created out of natural resources.
>
> "So I have been working to develop the natural resources that would feed my wife the rest of our lives. That's why I did it."

Mr. Coleman and his wife located the 18 claims here in issue. Seven claims were located in 1949, one in 1950, nine in 1951 and one in 1952. A list of the claims showing the date of location and the recording of the locations' notices appears on page 23 of the Appendix.

The claims were specifically located for building stone under the Building Stone Act of 1892, being Section 161 of the Mining Law (30 U.S.C.). The pertinent parts of that law have been quoted in the briefs and in the decision of the court, and needs no repetition here.

At the time those claims were located there was no question about the scope or meaning of Section 161 (U.S.C. 30) and the Common Varieties Act of 1955, (Sec. 611, 30 U.S.C.) was far in the future.

The evidence is uncontradicted that the land covered by the Coleman claims was "principally valuable for building stone". Therefore, the claims located by Mr. and Mrs. Coleman in 1949, 1950, 1951 and 1952 were valid when located and could not be invalidated by the passage of the Common Varieties Act of 1955 because they were saved by the exclusions therein.

The court in its decision refers to the land covered by the Coleman mining claims as "720 acres on a highly scenic national forest * * *". That statement, taken from a footnote in the Government's brief is irrelevant because it is perfectly legal for a citizen to file mining claims within a national forest. That was provided in the law which created the Forest Service. At page 5 of its brief herein, the United States admits that fact (16 U.S.C. 478).

Coleman, the petitioner, now asks this court to protect his rights which were granted him by the Mining Laws of 1872 (30 U.S.C.); the Forest Service Law of 1897 (16 U.S.C. 478) and the Building Stone Land Law of 1892, Sec. 161 of the Mining Law (30 U.S.C.). He invokes the equal protection of the laws provided by the Constitution and the Bill of Rights.

II.

The Common Varieties Act 30 U.S.C. Section 611, July 23, 1955, Is Not Germane to This Case.

(1) As pointed out in our brief herein, this case was initiated by a complaint in contest filed by the Department of the Interior at the request of the Forest Service. There were three allegations in the contest complaint. These are set out in full on page 8 of our brief herein and at page 79 of the Appendix.

The court will see that there is no charge in the contest complaint that the Common Varieties Act was applicable. Neither was there any charge that the stone on the lands covered by Mr. Coleman's claim was a common variety.

(2) In addition to there being no charge involving this question, it also appears from the transcript of the evidence (App. p. 139), that the Hearing Examiner specifically told Mr. Coleman, who was defending himself in the contest, that the Common Varieties Act of 1955 was *not* involved in the hearing. This particular matter is discussed at length in the argument in our brief filed herein, beginning at page 22.

Is it justice or right that a man is charged with certain things; is told that the Common Varieties Law of 1955 is not involved and then finally, in the decision by a deputy solicitor, the 1955 Act is used against him? This denies Coleman due process of law.

(3) There is another factual reason why the Common Varieties Law of 1955 has no place in this case. The evidence shows that Mr. Coleman and his wife located the eighteen placer mining claims years prior to the passage of the Common Varieties Act (App. p. 23).

Therefore, the Common Varieties Act could not by its terms and did not apply to Mr. Coleman's mining claims which were valid when located and remain valid to this date.

(4) There is a more particular reason, however, which is that the Common Varieties Act specifically provides that it shall apply only to mining claims "hereafter located". Section 611 hereof reading in part:

> "No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to *any mining claim hereafter located* under such mining laws: * * *" (Emphasis added).

(5) It certainly is a fundamental rule of law that a decision may not go beyond the issues tendered by the complaint. The complaint in contest did not contain any charge involving the Common Varieties Act. That Act was excluded from the hearing (App. p. 139), and should be excluded from this appeal. The decision of the Department of the Interior as to Common Varieties is, therefore, unconstitutional as to Mr. Coleman, and a denial of due process of law.

The decision of this court adopting the Department's views as to Common Varieties then is also a denial of due process of law.

(6) The Common Varieties Act was passed July 23, 1955, many years after the Mining Laws of 1872 (30 U.S.C. Sec. 21, et seq.), and the Building Stone Act of 1892 (30 U.S.C. 161). Therefore, the decision of this court in *Ickes v. Development Corporation,* 295 U.S.

639 decided June 3, 1935 is directly in point. At page 645 this court says:

> "2. The Leasing Act of 1920 inaugurated a new policy. Instead of the acquisition of rights by location, the Act provided for leases. But by express provision, the Act saved existing valid claims 'thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws.' Sec. 37.[2] What then was the status of plaintiff's claims under this exception? They were originally valid claims."
>
> * * *
>
> "In this view, plaintiff came directly within the exception. The Government invokes the new policy of the Leasing Act abolishing the practice of location. But the saving provision of Sec. 37 is a part of the policy of the Act. Its terms explicitly declare the will of Congress as to valid existing claims, with full understanding of the status of such claims under the prior law."

Section 37 of the Leasing Act above referred to is quoted as a footnote on page 644 of that decision and reads in part:

> "* * * except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

III.
"Marketability at a Profit" Is Not Germane to This Case.

Even if the Department of the Interior's decision in this contest as to "marketability at a profit" was legal, it does not apply to Coleman's mining claims for the following reasons:

(1) The leading case on the requirements for proof of a valuable deposit of mineral is, of course, *Castle v. Womble,* decided in 1894 by the Department of the Interior and, as pointed out in this court's decision, *Castle v. Womble* has been approved several times by this court. Unfortunately, in many instances the first portion of the rule is quoted, whereas the latter part of the rule specifically excludes profit. A possible market, yes. Profit, no. Here is what the latter part of *Castle v. Womble* says:

> "For, if as soon as minerals are shown to exist, and at any time during exploration, *before the returns become remunerative,* the lands are subject to other disposition, few would be willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do." (Emphasis added).

The rule stated in *Castle v. Womble* and first approved by this court in *Chrisman v. Miller* has been followed in innumerable cases. For a lengthy annotation we refer the court to 30 U.S.C.A. under Sec. 23 on page 75, Note 141, which is entitled "Value and Extent of Minerals." The first case referred to is *Chrisman v.*

Miller. There are more than two full pages of annotations from many courts which follow the rule of *Castle v. Womble.*

The evidence is uncontradicted that Mr. Coleman did have a market within the meaning of the prudent man rule.

The latest decision we can find wherein this court approved the prudent man rule is *Best v. Humbolt Placer Mining Co.,* 371 U.S. 334, 83 Supreme Court Rep. 379. The case was decided January 14, 1963 which is long after the passage of the Common Varieties Act in 1955.

There is nothing said or intimated in the *Best* case about "marketability at a profit." Therefore, the use by the Department of the Interior of the additional requirement of "marketability at a profit" to prove discovery is a new and additional qualification.

There is no claim by the Department of the Interior, and cannot be, that this new requirement was published in the Federal Register as required by the Administrative Procedure Act. Therefore, such requirement by the Department that "marketability at a profit" is required in the *Coleman* case is illegal and denies to Coleman due process of law.

(2) This court in its decision herein quotes a part of Section 22 of the Mining Law to the effect that the deposit located must be valuable.

(a) The Congress of the United States in passing the Building Stone Act, Section 161 of the Mining Law, specifically provided that land "chiefly valuable for building stone" is a valuable deposit. Since Mr. Coleman's mining claims were excluded from the 1955

Act by its terms, this makes unnecessary any further proof of "valuable deposit."

(3)(a) This court in its decision of April 22, 1968 accepts the suggestion of the Department of the Interior that "marketability at a profit" is a logical complement to the 'prudent man test'. * * *"

(b) With the foregoing statement we do not agree. But assuming for the sake of argument that it is correct, before the Department of the Interior could make this addition to the Prudent Man Rule, that addition must have been published in the Federal Register so that the public interested would know and could object thereto. This was not done. Therefore, the "marketability at a profit" addition to the Prudent Man Rule is illegal and void under the Administrative Procedure Act which requires that regulations by the Department must first be published in the Federal Register.

(c) Report No. 1608 of the Senate of the United States, issued September 19, 1966 is labeled The Common Varieties Act Amendment. The Report, after listing many causes of complaint against the Department's misuse of the Common Varieties Act of 1955, has this statement in paragraph two:

> "* * * that is, the marketability rule as *opposed* to the historic prudent man rule." (Emphasis added).

Since the Report 1608 was accepted by the Sentate and amendments to the Common Varieties Act of 1955 were passed by the Senate, we therefore, can see that the Senate of the United States has an entirely different view of the marketability rule from that now claimed by the Department of the Interior and accepted by this court.

(4) When the Department of the Interior said that the building stone on the Coleman claims are a common variety within the Common Varieties Act of 1955, even though they were located years before that law was passed, the Department is trying to amend that law by repealing the exclusions contained in said Act by its provision above quoted. This attempt by the Department to repeal a portion of the Common Varieties Act of 1955 is attempted legislation in violation of Article I, Section 1 of the Constitution. Therefore, it is unconstitutional and deprives Coleman of due process.

This court in accepting such attempt by the Department also deprives Coleman of his Constitutional rights.

IV.

Lack of Good Faith Was Not Charged or Proved in the Contest.

(a) The evidence is undisputed that for several years before the passage of the Common Varieties Act on July 23, 1955 (30 U.S.C. 611), and through the years thereafter, Coleman worked diligently developing the mining claims, working ten to twelve hours a day. The evidence is that the rock is very hard and difficult to handle. The work he was doing was "back breaking work."

Experience and logic, therefore, should tell us that Mr. Coleman would not have worked year after year in that manner if he had any hidden motive in locating and developing these claims. It is undisputed then, that he was acting in good faith as his sole purpose was to develop a building stone industry.

(b) In its decision this court quotes an innuendo by the United States in its brief that because Mr. Coleman

built a house, this indicates it "* * * might well be thought to raise a substantial question as to Coleman's real intentions." This is taken from page 21 of the brief on behalf of the United States.

It is utterly without foundation because common sense indicates that a miner must have a house and a machine shop in which to live while he is working his mining claims, located high in the mountains at an elevation of 6724 feet (App. p. 105) with extreme weather conditions.

V.

Coleman Has Been Denied Due Process of Law.

As heretofore pointed out in our brief and in this petition, the complaint in contest which originated this proceeding, contained three charges only.

The complaint in contest is set out at length at pages 79 and 80 of the Appendix herein. Neither good faith on behalf of Mr. Coleman, or "marketability at a profit" were put in issue in the complaint in contest. The Common Varieties Law of July 23, 1955, was not put in issue. At the hearing the Hearing Officer specifically told Mr. Coleman that such law was not involved in the hearing (App. p. 139).

The final decision by the Department of the Interior in the contest was a decision dated March 27, 1962 written by a Deputy Solicitor. This decision appears in the Appendix at pages 7-13, inclusive.

Since that decision on appeal to the Secretary of the Interior ignores the three charges of the complaint in contest and decided that the only issue was as to "marketability at a profit", his decision goes beyond the issues tendered and is therefore, unconstitutional and

deprives Alfred Coleman of due process of law under the 5th and 14th Amendments of our Bill of Rights.

Because this court, in its opinion of April 22, 1968, approves that decision by the Deputy Solicitor on appeal to the Secretary of the Department of the Interior and also accepts the innuendo of the Government's brief hinting bad faith on the part of Mr. Coleman, the decision of this court also deprives Alfred Coleman of due process of law under the 5th and 14th amendments of the Bill of Rights.

Conclusion.

This Supreme Court, in its decision of April 22, 1968, says: "* * * We granted the Government's petition for certiorari because of the importance of the decision to the utilization of public lands."

We agree that the questions involved in this case are important not only to Alfred Coleman, the respondent, but also to the mining industry.

It is also important to the economy of the United States and hence to all the people because with the growth of population, use of minerals is also increasing. Officials of the Department of the Interior have recently stated that shortages are in sight unless new deposits of minerals are found. Therefore, it is necessary that the mining laws of the United States be "faithfully executed" by the Department of the Interior as the laws have been written by Congress and according to their meaning (see Note p. 39 of Coleman's brief herein).

The decision of this case is also important because the Department of the Interior should be required to

administer the law as written, because changes made by the Department are actually attempted legislation in violation of various articles of the Constitution listed above.

Wherefore, Alfred Coleman, the respondent, and petitioner herein, prays:

(1) That this court's decision made on April 22, 1968 be set aside;

(2) That rehearing be granted herein.

Respectfully submitted,

GEORGE W. NILSSON, ESQ.,
Attorney for Respondent.

W. H. WEDDELL, ESQ.,
MONTA W. SHIRLEY, ESQ.,
Of Counsel.

May 10, 1968.

Certificate of Counsel.

I, George W. Nilsson, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and it is restricted to the grounds specified above.

GEORGE W. NILSSON,
Counsel for Petitioner